MIDF Amanah Ventures Sdn Bhd v Lim Thiam Chye

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-439–12 OF 2016
LIZA CHAN JC
21 AUGUST 2020

Civil Procedure — Enforcement — Order of specific performance — Plaintiff obtained order of specific performance for defendant to proceed with purchase of option shares — Whether plaintiff could enforce order of specific performance under Rules of Court

Contract — Agreement — Subscription agreement for redeemable cumulative preference shares — Defendant agreed to purchase option shares from plaintiff — No purchase of option shares performed by defendant — Plaintiff obtained order of specific performance for defendant to proceed with purchase of option shares — Whether defendant required to comply with order of specific performance — Rules of Court 2012 O 81 r 1

This was an application by the plaintiff by way of encl 65 for further orders that the defendant completed the purchase of 500,000 redeemable convertible cumulative preference shares of RM1 each ('the option shares') held by the plaintiff in BTS Holdings (M) Sdn Bhd pursuant to an order of specific performance dated 29 August 2017. Pursuant to a subscription agreement dated 13 March 2007 ('the subscription agreement') made between the plaintiff and a BTS Holding (M) Sdn Bhd ('BTS'), the plaintiff agreed to subscribe for 500,000 redeemable convertible cumulative preference shares of RM1 each in BTS ('the subscription shares'). The plaintiff did subscribe for the shares pursuant to the subscription agreement. By a put and call option agreement, the plaintiff and the defendant agreed as follows: (a) in consideration of the plaintiff, at the request of the defendant entering into the subscription agreement with BTS, the defendant irrevocably granted to the plaintiff a put option to require the defendant to purchase up to 500,000 of the option shares from the plaintiff at the aggregate of the subscription price of RM5m and an additional 25%pa of the subscription price; (b) the put option might be exercised by the plaintiff at any time during the put potion period by serving a notice in writing to the defendant; and (c) the defendant shall purchase from the plaintiff all the option shares specified in the put option notice at the put option price. By the put option notice dated 4 January 2011, the plaintiff informed the defendant that he was required to purchase the option shares from the plaintiff at the put option price of RM9,835,349 and

that the completion of purchase was to take place on 25 January 2011. The plaintiff filed the suit and was allowed summary judgment under O 81 r 1 of the Rules of Court 2012. The order for specific performance dated 29 August contained penal notice. The defendant did not accede to the plaintiff's solicitors' demand to comply with the order of 29 August 2017, hence the present application by the plaintiff.

Held, allowing plaintiff's application in encl 65:

(1) There was no merit in any of the defendant's contentions. It was undisputed that the court order dated 29 August 2017 for specific performance was not complied with. It was trite law that the court continued to maintain control over the working out of the order. After the specific performance order was affirmed by the Court of Appeal but the defendant failed to be complied but instead to rehash arguments which was in effect an attempt to circuitously challenged the specific performance order. This surely cannot be countenanced by this court based on the principles of res judicata (see paras 20–22 & 37).

(2) The cases produced by the defendant to support his arguments that the plaintiff's application for further order is not a method of enforcement under the Rules of Court 2012 and that a claim for money cannot be specifically enforced are misplaced. When evaluating if there will be any injustice or prejudice attending the power of the court to grant the prayers presently sought by the plaintiff, it is my view that regard was to be had to item (iv) of the order for specific performance which gave the plaintiff 'liberty to apply'. The court considered view that this 'liberty to apply' was not purely cosmetic in value (see paras 27, 33 & 35).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif melalui lampiran 65 untuk perintah lanjutan bahawa defendan telah menyelesaikan pembelian 500,000 saham pilihan keutamaan kumulatif boleh tukar boleh tebus sebanyak RM1 setiap satu ('pilihan saham tersebut') kepunyaan plaintif dalam BTS Holdings (M) Sdn Bhd berdasarkan perintah perlaksanaan spesifik bertarikh 29 Ogos 2017. Berdasarkan perjanjian langganan saham bertarikh 13 Mac 2007 ('perjanjian langganan tersebut') yang dibuat antara plaintif dan BTS Holding (M) Sdn Bhd ('BTS'), plaintif bersetuju untuk melanggan 500,000 saham pilihan keutamaan kumulatif boleh tukar boleh tebus sebanyak RM1 setiap satu di BTS ('langganan saham tersebut'). Plaintif telah melanggan saham tersebut berdasarkan perjanjian langganan saham. Berdasarkan perjanjian pilihan letak dan panggil, plaintif dan defendan bersetuju seperti berikut: (a) berdasarkan balasan oleh plaintif, atas permintaan defendan dalam memasuki perjanjian langganan dengan BTS, defendan memberikan pilihan letak kepada plaintif untuk menuntut defendan membeli sehingga 500,000 pilihan saham daripada plaintif dengan jumlah harga langganan sebanyak RM5 juta dan tambahan

25% setahun dari harga langganan; (b) pilihan letak boleh dilaksanakan oleh plaintif pada setiap masa selama tempoh letak dengan menyerahkan notis secara bertulis kepada defendan; dan (c) defendan harus membeli dari plaintif kesemua pilihan saham yang dinyatakan dalam notis pilihan letak pada harga pilihan letak. Melalui notis pilihan letak bertarikh 4 Januari 2011, plaintif memaklumkan kepada defendan bahawa beliau diminta untuk membeli pilihan saham dari plaintif pada harga pilihan letak sebanyak RM9,835,349 dan bahawa penyelesaian pembelian akan dilaksanakan pada 25 Januari 2011. Plaintif memfailkan tuntutan tersebut dan penghakiman terus dibenarkan di bawah A 81 k 1 dari Kaedah-Kaedah Mahkamah 2012. Perintah untuk perlaksanaan spesifik bertarikh 29 Ogos mengandungi notis penalti. Defendan tidak memenuhi permintaan peguamcara plaintif untuk mematuhi perintah 29 Ogos 2017, dengan itu permohonan semasa oleh plaintif.

Diputuskan, membenarkan permohonan plaintif di lampiran 65:

(1) Tidak ada merit dalam sebarang hujahan oleh defendan. Ianya tidak dipertikaikan bahawa perintah mahkamah bertarikh 29 Ogos 2017 untuk perlaksanaan spesifik tidak dipatuhi. Adalah undang-undang yang mantap bahawa mahkamah harus secara berterusan mempunyai kawalan terhadap penguatkuasaan suatu perintah. Setelah perintah perlaksanaan spesifik disahkan oleh Mahkamah Rayuan tetapi defendan gagal mematuhi tetapi sebaliknya untuk mengulangi hujah-hujah yang sebenarnya merupakan percubaan untuk menentang perintah perlaksanaan tersebut. Perkara ini seharusnya dibenarkan oleh mahkamah ini berdasarkan prinsip-prinsip res judicata (lihat perenggan 20–22 & 37).

(2) Kes-kes yang dikemukakan oleh defendan bagi menyokong hujahannya bahawa permohonan plaintif untuk perintah lanjutan bukanlah merupakan kaedah penguatkuasaan berdasarkan Kaedah-Kaedah Mahkamah 2012 dan bahawa tuntutan kewangan tidak dapat dilaksanakan secara khusus adalah tidak salah arah. Apabila menilai sama ada berlaku ketidakadilan atau prejudis ketika mahkamah menggunakan kuasanya untuk membenarkan permohonan semasa oleh plaintif, menurut saya, ianya adalah berdasarkan pada perkara (iv) perintah perlaksanaan spesifik yang memberikan plaintif 'kebebasan untuk memohon'. Mahkamah mempertimbangkan pandangan bahawa 'kebebasan untuk memohon' ini bukan semata-mata pernilaian kosmetik (lihat perenggan 27, 33 & 35).]

Cases referred to

Akitek Indahreka (M) Sdn Bhd v Taman Sea View Sdn Bhd & lain-lain [2001] MLJU 637, HC (refd)

Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd [1998] 6 MLJ 136, HC (refd)

Cheah Tjeng Siong v Lim Sin Oo & Ors [1991] 3 MLJ 38, HC (refd)
Datin Paduka Nur Hayati bt Mohamed v Janavista Sdn Bhd (in liquidation) [2017] 11 MLJ 221, HC (refd)
Gee Boon Kee & Ors v Tan Pok Shyong as legal representative of the estate of Tan Ah Tong [2018] 1 MLJ 155, FC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Ismail bin Mohd Yunos & Anor v First Revenue Sdn Bhd [2000] 5 MLJ 42, HC (refd)
Lee Jhen Shen & Ors v Shamhudeen Mohd Yunus [2014] 1 LNS 976 (refd)
Lee Lay Ling v Goh Kim Nam (Cheah Pei Ching, co-respondent) [2014] 8 MLJ 805, HC (refd)
Lim Chau Leng v Wong Chee Chong [2006] 2 MLJ 269, HC (refd)
Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal [2017] 1 MLJ 262, CA (refd)
Savena Supramaniam Pillay v Tan Kah Chiat, Administrator of Tan Kong Liang, deceased [1934] 1 MLJ 133 (refd)
Sudagar Singh v Nazeer [1978] 3 All ER 817, Ch D (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494, SC (folld)
Tan Sin Syn v Delta Finance Company Bhd [1996] MLJU 160, HC (refd)
Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal [2017] 1 MLJ 301, FC (refd)

Legislation referred to

Rules of Court 2012 O 20 r 11, O 81 r 1

Anita Sockalingam (Raneesha Thayalan with her) (Zain & Co) for the plaintiff.
Jec Siose (Chen Hui Ken with him) (Jec Siose & Co) for the defendant.

Liza Chan JC:

[1] This is an application by the plaintiff by way of encl 65 for further orders that the defendant completes the purchase of 500,000 redeemable convertible cumulative preference shares of RM1 each held by the plaintiff in BTS Holdings (M) Sdn Bhd ('the option shares') pursuant to an order for specific performance dated 29 August 2017 of this court.

BACKGROUND

[2] The facts are not disputed.

[3] Pursuant to a subscription agreement dated 13 March 2007 ('the subscription agreement') made between the plaintiff and a company known as BTS Holdings (M) Sdn Bhd ('BTS'), the plaintiff agreed to subscribe for 500,000 redeemable convertible cumulative preference shares of RM1 each in

BTS ('the subscription shares'). The plaintiff did subscribe for the shares pursuant to the subscription agreement.

[4] By a put and call option agreement of the same date ('the put and call option agreement'), the plaintiff and defendant agreed that:

(a) in consideration of the plaintiff, at the request of the defendant entering into the subscription agreement with BTS, the defendant irrevocably granted to the plaintiff a put option (as defined in the put and call option agreement) to require the defendant to purchase up to 500,000 redeemable convertible cumulative preference shares of RM1 each held by the plaintiff in BTS ('the option shares') from the plaintiff at the aggregate of the subscription price of RM5m and an additional 25% pa of the subscription price (which is inclusive of the cumulative dividend of 10% pa) ('the put option price') on the terms and conditions as set out therein;

(b) the put option may be exercised by the plaintiff at any time during the put option period (as defined therein) by serving a notice in writing to the defendant ('the put option notice');

(c) that upon service of the put option notice by the plaintiff, the defendant shall purchase from the plaintiff, free from all liens, charges and other encumbrances in favour of the plaintiff and with all rights attaching thereto, all the option shares specified in the put option notice at the put option price;

(d) that upon the put option notice being duly served on the defendant, completion of the sale and purchase of the option shares shall take place on the completion date (as defined therein); and

(e) that if the defendant were to default in making payment or causing payment to be made of any sum payable by it under the put and call option agreement, the defendant shall pay to the plaintiff the amount due together with interest from the date of such payment is due until the date of actual payment (as well after as before judgment) at the rate per annum equivalent to the prevailing fixed deposit rate in the banking industry.

[5] By the put option notice dated 4 January 2011, the plaintiff informed the defendant that he was required to purchase the option shares from the plaintiff at the put option price of RM9.835,349 and that the completion of purchase was to take place on 25 January 2011.

[6] The plaintiff filed the suit herein on 29 December 2016 and on 29 August 2017 was allowed summary judgment under O 81 r 1 of the Rules of Court 2012 as follows:

(i) that the defendant specifically performs his obligations to purchase the option shares at the put option price as stated in the put option notice dated 4 January 2011 in accordance with the terms of the put and call option agreement within 14 days thereof;

(ii) that the defendant pays damages to be assessed for breach of the put and call option agreement;

(iii) that the defendant pays interest on the damages in para (ii) above at the rate of 3.2% pa, being equivalent to the prevailing fixed deposit rate in the banking industry, from 26 January 2011 until full settlement thereof (save and except on any interest awarded under para (ii) above);

(iv) that the plaintiff be given liberty to apply; and

(v) that the defendant pays costs of RM6,000 to the plaintiff subject to allocator.

[7] The order for specific performance dated 29 August 2017 contained a penal notice.

[8] The defendant's appeal to the Court of Appeal was dismissed by the Court of Appeal on 13 April 2018.

[9] The plaintiff's application for damages to be assessed for breach of the put and call option agreement was allowed by a court order dated 15 August 2018, and damages was awarded based on interest that the plaintiff would have earned on the sum of RM9,835,349 at the fixed deposit rate of 3.16%pa from 26 January 2011 to the date of full settlement of the said sum of RM9,835,349 and costs of RM5,000 subject to allocator.

[10] The defendant did not accede to the plaintiff's solicitors' demand dated 29 January 2019 to comply with the order of 29 August 2017, hence the present application by the plaintiff.

THE PLAINTIFF'S SUBMISSIONS

[11] The plaintiff's learned counsel submitted that in view that the defendant had failed to abide by the order dated 29 August 2017 to purchase the option shares in accordance with the terms of the put and call option agreement, it is entitled to apply for further orders directing the defendant to complete before proceeding to execution.

[12] To understand the bone of contention between the parties, it is necessary to set out the orders sought by the plaintiff in encl 65:

(a) the plaintiff be at liberty to deposit in court the BTS Holdings (M) Sdn Bhd Share Certificate No 001P and a share transfer form duly executed in escrow by the plaintiff in respect of the option shares in favour of the defendant ('the said documents') and shall by its solicitors notify the defendant or the defendant's solicitors in writing of the deposit of the said documents in court ('the said notification') within seven days from the order hereof;

(b) the defendant shall pay the plaintiff the sum of RM9.835,349 being the put option price as stated in the put option notice dated 4 January 2011, by way of a banker's draft made out to the plaintiff to be delivered to the plaintiff's solicitors, Messrs Zain & Co, at 6th Floor, Akademi Etiqa, 23, Jalan Melaka, 50100 Kuala Lumpur, within seven days from the said notification or such other period as the court may direct;

(c) costs of the application to be borne by the defendant; and

(d) such further or other relief as this honourable court deems fit and proper.

THE DEFENDANT'S SUBMISSIONS

[13] In resisting the plaintiff's application, the defendant contended that as the contents of the order sought in encl 65 differ from the original contents of the court order dated 29 August 2017:

(a) the plaintiff's application is unlawful as it requires a variation of the court order that has already been passed by the court on 29 August 2017; and

(b) that the order that has been passed by the court dated 29 August 2017 as well as the judgment dated 15 August 2018 do not mention that the defendant shall pay the plaintiff the sum of RM9.835,349 within seven days from the said notification or such other period as the court may direct.

[14] The defendant argued that once a judgment has been passed and entered, the court has no power under any application in the same action to alter vary or set aside a judgment that has already been entered or drawn up unless under the slip rule, where there are errors in the judgment and therefore, is necessary to correct the errors in expressing the intention of the court and relied on:

(a) O 20 r 11 of the Rules of Court 2012;

(b) *Savena Supramaniam Pillay v Tan Kah Chiat, Administrator of Tan Kong Liang, deceased* [1934] 1 MLJ 133;

(c) *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143;

(d) *Akitek Indahreka (M) Sdn Bhd v Taman Sea View Sdn Bhd & Llain-lain* [2001] MLJU 637; and

(e) *Datin Paduka Nur Hayati bt Mohamed v Janavista Sdn Bhd (in liquidation)* [2017] 11 MLJ 221.

[15] The defendant argued there are no clerical mistakes nor errors in the 29 August 2017 order. He also countered that the plaintiff's application for further orders is NOT a method of enforcement under the Rules of Court 2012 and cited *Akitek Indahreka (M) Sdn Bhd v Taman Sea View Sdn Bhd & lain-lain* as authority, claiming that the facts of the said case is similar to the present case.

[16] Additionally, the defendant argued that should the application be allowed, he will be unfairly prejudiced as the defendant will be bound to comply with payment of the said sum stated in the order dated 29 August 2017 within the stipulated time and as such, that the defendant is put to a position lower and beyond the scope of the put option agreement between the parties in that the put option agreement does not in any way provide such a term nor could be construed in such a way for payment being the put option price by the defendant to be made within a specific period of time to the plaintiff. He contended that if there is a sum to be paid, but was not paid under the agreement, the plaintiff should apply the normal mode of enforcement for monetary judgments provided by the Rules of Court 2012. He thus asserted that granting the orders sought in encl 65 would mean enhancement of the terms of the put option agreement in the plaintiff's favour, of which failure to comply may lead to contempt proceedings against the defendant and cited *Lim Chau Leng v Wong Chee Chong* [2006] 2 MLJ 269 as well as *Cheah Tjeng Siong v Lim Sin Oo & Ors* [1991] 3 MLJ 38 in support.

[17] The defendant submitted that if non payment constituted an act of contempt, then the consequences would be grave for all those who were in breach of any payment as ordered by the court as they would face committal proceedings and suffer the pain of a fine or imprisonment or both: *Lee Lay Ling v Goh Kim Nam (Cheah Pei Ching, co-respondent)* [2014] 8 MLJ 805.

[18] The defendant also countered that a claim for money cannot be specifically enforced: *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd* [1998] 6 MLJ 136, *Ismail bin Mohd Yunos & Anor v First Revenue Sdn Bhd* [2000] 5 MLJ 42, *Lee Jhen Shen & Ors v Shamhudeen Mohd Yunus* [2014] 1 LNS 976 and *Tan Sin Syn v Delta Finance Company Bhd* [1996] MLJU 160.

A FINDINGS OF THIS COURT

[19] There is only one issue in the instant application before the court — it is whether the plaintiff is entitled to the orders sought as produced verbatim at para 12 above.

B

[20] In my respectful view, having given due consideration to all relevant matters, the submissions of the parties and the applicable law, there is no merit in any of the defendant's contentions.

C

[21] It is undisputed that the court order dated 29 August 2017 for specific performance has not been complied with.

[22] As such, it is trite law that the court continues to maintain control over D the working out of the order. The view I took is in light of firstly, the pronouncements of the Federal Court in *Gee Boon Kee & Ors v Tan Pok Shyong as legal representative of the estate of Tan Ah Tong* [2018] 1 MLJ 155 where it stated at para 38:

E [38] The law is clear that when an order for specific performance is made, the contract remains in effect and is not merged in the judgment for specific performance, and a court of equity or one exercising equity jurisdiction, maintains full control of the matter. This proposition of law was accepted by the House of Lords in *Johnson and another v Agnew* as follows:

F Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. This is clear law, best illustrated by the judgment of Greene MR in *Austins of East Ham Ltd v Macey* in a passage which deals both with this point and with that next following. It repays quotations in full:

G The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by the aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is H that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that, so far from proceeding to the enforcement of an order for specific performance, the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to I enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance.

Fifthly, if the order for specific performance is not complied with by the purchaser, the

vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition is as stated in *Austins of East Ham Ltd v Macey* (and see *Sudagar Singh v Nazeer* per Megarry VC) and is in my opinion undoubted law, both on principle and authority. It follows, indeed, automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied, or as Megarry VC puts it that he is refusing to complete. (Emphasis added.)

[23] Later in the same judgment, the Federal Court said:

[52] In this connection, we find the following observation of the English High Court in *Yarwinder Gill v Siu-May Tsang, Pamigold Limited* to be useful:

33. Specific performance is an equitable remedy. Once granted, the contract remains in force and is not merged in the judgment. But, that said, the equitable nature of the remedy does not stop with the grant of the order. The court controls the working out, variation or cancellation of the order. Equitable principles apply to these processes.

34. The principles I have stated were enunciated by Lord Wilberforce in a vendor's action for specific performance in *Johnson v Agnew* [1980] AC 367 at pages 392 ff. It is worth setting out two short passages at pp 394 and 399 verbatim:

> Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition is as stated in *Austins of East Ham Ltd v Macey* [1941] Ch 338 (and see *Singh (Sudagar) v Nazeer* [1979] Ch 474, 480, per Megariy VC) and is in my opinion undoubted law, both on principle and authority. It follows, indeed, automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied, or as Megarry VC puts it [1979] Ch 474, 480, 790, that he is refusing to complete.
>
> Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The court would not make an order dissolving the decree of specific performance and terminating the contract (with recovery of damages) if to do so would be unjust, in the circumstances then existing, to the other party, in this case to the purchaser. (To this extent, in describing the vendor's right to an order as 'ex debito justitae' Clauson LJ may have put the case rather too strongly: *John Barker & Co Ltd v Littman* [1941] Ch 405, 412). This is why there was, in the Court of Appeal, rightly, a relevant and substantial argument, repeated in this House, that the non-completion of the contract was due to the default of the vendors: if this had been made good, the court could

properly have refused them the relief sought.

> 35. *Nothing in these passages deprives the court of its equitable jurisdiction to make the order for specific performance work*. There is not, as Mr Mark Warwick, counsel for Pamigold, suggested, a stark choice between enforcing or dissolving the order. *The court may, in my judgment, make such orders as are just and equitable in the circumstances then existing, to give practical effect to the order it has made. In making its order work in the circumstances then arising, the court is not re-writing or even varying the contract between the parties. It is providing a mechanism to give the claimant what he bargained for, namely the sale or purchases of land*. Such relief may be granted in a whole range of circumstances in which a defendant has failed to perform both his original contract and the court's subsequent order. If Mr Warwick were right, an inappropriate and unnecessary rigidity would be introduced into the equitable remedy of specific performance. (Emphasis added.)

[24] Secondly, the pronouncements in *Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal* [2017] 1 MLJ 262 where the Court of Appeal with Zawawi Salleh JCA (as His Lordship then was) delivering judgment of the court endorsed fully the views in two Indian cases as follows:

> [13] In *Ramankutty Guptan v Avara* AIR 1994 SC 1699, the Supreme Court of India has in no uncertain term held that after passing the degree *(sic)* for specific performance, the court does not cease to have jurisdiction in the suit but retains control over the decree.
>
> In the same vein, in *Abdul Shaker Sahib v Abdul Rahman Sahib and Anr* AIR 1923 Mad 284, the Madras High Court held that the degree *(sic)* for specific performance was in its nature a preliminary decree; the original court retains the full power to make any just or necessary order therein, including in appropriate cases, the extension of time.

[25] Thirdly, *Sudagar Singh v Nazeer* [1978] 3 All ER 817 also makes clear that when an order for specific performance of a contract is made, the contract itself does not merge in the order and the order is made by reference to the rights of the parties under the contract, it is the provisions of the order and not those of the contract which govern the future performance of the contract. This puts paid the defendant's argument that he will be unfairly prejudiced if the court allows the plaintiff's application and that it would render the defendant to a position lower and beyond the scope of the put option agreement in that the put option agreement did not say a specific time as to when payment of the put option price is to be made by the defendant.

[26] What Megarry VC expounded in *Sudagar Singh* at pp 821–823 merits production:

> First, it seems clear that when an order for the specific performance of a contract for the sale of land is made, the contract continues to exist and is not merged in the order ...
>
> Second, it also seems clear that once an order for specific performance has been made, there are adequate remedies available to either party if the other does not appear to be proceeding under the order with due dispatch. *Thus an application may be made for a time and place for completion to be fixed. or for an order rescinding the contract. either forthwith, if the other party is refusing to complete. or else in default of completion within a limited time*. I need not set out all the possibilities in detail: they appear in *Fry's Specific Performance*; and see *Capital and Suburban Properties Ltd v Swycher* [1976] 1 All ER 881 at p 888; [1976] Ch 319 at pp 330–331, per Sir John Pennycuick). *By applying to the court for an order of specific performance, and obtaining it, I think that the applicant has put it into the hands of the court how the contract is to be carried out. As the court has become seised of the matter, and has made an order, it seems to me that subject to anything that the parties may then agree, the working out, variation or cancellation of that order is essentially a matter for the court.* The continued existence of the contract is one thing, its working out is another ...
>
> In my judgment, once an order for specific performance has been made, the remedy for a party who complains of delay is to come to the court and not to attempt the extra-curial remedy of serving a completion notice. (Emphasis added.)

[27] The defendant's contentions when scrutinised against the weight of the above authorities must fail. The cases produced by the defendant to support his arguments that the plaintiff's application for further orders is NOT a method of enforcement under the Rules of Court 2012 and that a claim for money cannot be specifically enforced are misplaced as the court in those cases were confronted by monetary claims; significantly they were not really concerned with enforcing an order for specific performance as obtained here.

[28] My view is further fortified by what is distilled from the case of *Cheah Tjeng Siong v Lim Sin Oo & Ors* [1991] 3 MLJ 38 where the judgment creditor obtained an order for specific performance of a contract but instead enforced the judgment by way of bankruptcy proceedings. Edgar Joseph Jr J (as His Lordship then was) in setting aside the bankruptcy notice held that it is clear law that if a defendant fails to comply with an order for completion, the plaintiff cannot immediately proceed to execution, but must first apply for a further order directing the defendant to complete. The learned judge reasoned:

> My own research into the authorities show that it is clear law that if a defendant fails to comply with an order for completion, *the plaintiff cannot immediately proceed to execution (see Palmer v Lark* [1945] 1 Ch 182 at p 184) *but must first apply for a further order directing the defendant to complete* (see *Morgan v Brisco* (1886) 32 Ch D 192). The application may be made by summons or motion (see, for example, 37 *Court Forms* (2nd Ed) (1981 issue) 132, Form 95). (Emphasis added.)

[29] Paragraph 28, p 36 of *Atkin's Enclyclopaedia of Court Forms* (Vol 37)

(1981 Issue) (referred to in the *Cheah Tjeng Siang* case) stipulates the procedure to be followed:

> If the defendant without due cause does not complete at the time and place so fixed, it is the practice for the plaintiff to apply by summons or notice of motion for an order either:
>
> (i) in a vendor's action: requiring the defendant purchaser to pay the purchase money to the plaintiff vendor upon the plaintiff lodging the title deeds in court; or
>
> (ii) in a purchaser's action: requiring the defendant vendor to execute a conveyance or transfer to the plaintiff purchaser upon the plaintiff lodging the purchase money in court.

[30] Paragraph 27, p 37 of *Atkin's Enclyclopaedia of Court Forms* Vol 37 (2001 Issue), states:

> ... In a seller's action under a contract for sale of land, if the Defendant without due cause does not complete at the time and place so fixed, it is the practice for the claimant to apply by application notice for an order requiring the defendant buyer to pay the purchase money to the claimant seller. The claimant lodges the transfer or conveyance (executed in excrow) and other documents to be handed over on completion in court.

[31] What the plaintiff had sought in encl 6 is precisely the procedure as alluded above in *Atkin's Court Forms*.

[32] It is to be emphasised that the observations in *Sudagar Singh* were cited with approval by both the Federal Court in *Gee Boon Kee & Ors v Tan pok Shyong as legal representatives of the estate of Tan Ah Tong* as well as *Cheah Tjeng Siong v Lim Sin Oo & Ors* [1991] 3 MLJ 38.

[33] When evaluating if there will be any injustice or prejudice attending the power of the court to grant the prayers presently sought by the plaintiff, it is my view that regard is to be had to item (iv) of the order for specific performance dated 29 August 2017 which gave the plaintiff 'liberty to apply'. As this was not addressed by the parties, I had invited arguments on its scope.

[34] As to the meaning of the phrase, I can do no better than to reproduce the observations of the Federal Court in *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal* [2017] 1 MLJ 301:

> [14] In *Cristel v Cristel* [1951] 2 All ER 574, the phrase 'liberty to apply' was discussed at some length by Somervell LJ. To appreciate the discussion of this phrase the facts in the latter case will have to be reproduced. In brief the parties viz the estranged husband and wife, had recorded a consent order which required the wife to give up possession of the place of residence to the husband, such order to be

suspended, 'until the husband provides suitable alternative accommodation ... by providing a two or three bedroomed house or bungalow ... either by renting the same ... or by purchase'. In the consent order parties were at liberty to apply to court. Later the husband took out a summons to vary the consent order by adding the words 'or flat' after '... bungalow'. Before the Master the husband's application was disallowed. On appeal the High Court judge allowed the appeal. The Court of Appeal took a different view and overturned the High Court's order and refused the variation sought for by the husband; and this was despite the phrase 'liberty to apply' being inserted in the abovementioned consent order.

[15] Somervell LJ when allowing the appeal made the following remarks:

> ... Prima facie, 'liberty to apply' is expressed very often — and, if it is not expressed, it will be implied — where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to get the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.

[16] Somervell LJ held the view that 'liberty to apply' should not be given too wide a berth, and prima facie, refers only to the working of the actual terms of the order. He concluded that the words 'or flat' could not be inserted as it was a plain alteration of what had been agreed upon. Lord Denning LJ likewise held the view that the court could not alter or vary the agreement of the parties under the phrase 'liberty to apply' in the circumstances of the case. The court could only do what was necessary to carry the agreement into effect.

[35] Having heard the further arguments of the parties, I am of the considered view that this 'liberty to apply' order is not purely cosmetic in value. It enables the plaintiff through encl 65 to seek the court 'for assistance in working out the rights declared'. The Court of Appeal in *Malpac Capital Sdn Bhd v Yang Toi Mee & Ors and another appeal* defined its application as follows:

[22] The principles as to the scope of 'liberty to apply' provisions were stated by Lord Mackay of Clashfern in *Halsbury Laws of England* (4th Ed, Reissue), Vol 37, 2001, para 1230 as follows:

> The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it.

A It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur.

B

[36] It is also to be remembered that the present application was brought about by the apparent failure of the defendant to comply with the court order for specific performance dated 29 August 2017. By the time the defendant unsuccessfully appealed to the Court of Appeal, the 14 days from 29 August C 2017 for the defendant to specifically perform his obligations to purchase the option shares at the put option price as stated in the put option notice dated 4 January 2011 in accordance with the terms of the put and call option agreement had expired not through any fault of the plaintiff.

D

[37] Pursuant to the specific performance order dated 29 August 2017, the defendant was to specifically perform his obligations to purchase the option shares within 14 days thereof, ie by 12 September 2018. After the said order was affirmed by the court of appeal, the defendant nevertheless did not comply but instead the defendant attempts in these proceedings to rehash arguments E which in my view is in effect an attempt to circuitously challenge the specific performance order. This surely cannot be countenanced by this court based on the principles of res judicata.

F **[38]** I have in mind the authoritative judgment of Eusoffe Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at pp 497–499:

> *The respondent by these proceedings is in our view in effect attempting to circuitously challenge the exercise by His Majesty of his powers of clemency* in this case under art 42 G of the Constitution which he is expressly precluded from doing by virtue of the provisions of art 32(1) of the Constitution which stipulate that His Majesty shall not be liable to any proceedings whatsoever in any court ...

At pp 498–499:

H There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this I regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and another v Attorney General for Queensland* [1979] AC 411 at p 425:

> The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present

case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

[39] The orders sought by the plaintiff in encl 65 are in my view proper and necessary for 'working out' the court order for specific performance dated 29 August 2017 and are not in any way a variation and/or alteration of it or rewriting the put and call option agreement as urged upon this court by the defendant. Ergo, the defendant's criticisms about the plaintiff's application founded on the principles enunciated in the cases of *Savena Supramaniam Pillay v Tan Kah Chiat, Administrator of Tan Kong Liang, deceased* [1934] 1 MLJ 133 and *Hock Hua Bank Bhd v Sahari Murid* have absolutely no basis.

[40] It must be appreciated that the very purpose of the plaintiff's application is to seek completion of the specific performance order due to non-compliance by the defendant.

[41] It is my respectful view that the two acts of:

(a) depositing in escrow the share transfer form by the plaintiff; and

(b) the subsequent payment of money by the defendant to carry to completion the court order dated 29 August 2017,

are acts inextricably intertwined and to be taken together. The payment of money by any stretch cannot conceivably be taken by itself by the defendant to ground an argument that payment of money cannot be specifically enforced at pain of contempt proceedings. To begin with, I reiterate that the original order for specific performance dated 29 August 2017 in fact contains a penal notice.

[42] I am of the view that the matter is really unarguable on the defendant's part.

[43] For the foregoing reasons and in the circumstances as obtained here, it is clear that the plaintiff is entitled to proceed as it did. I would allow the plaintiff's application in encl 65 and make the following orders:

A (a) the plaintiff be at liberty to deposit in court the BTS Holdings (M) Sdn Bhd Share Certificate No 001P and a share transfer form duly executed in escrow by the plaintiff in respect of the option shares in favour of the defendant ('the said documents') and shall by its solicitors notify the defendant or the defendant's solicitors in writing of the deposit of the B said documents in court ('the said notification') within seven days from the order hereof;

(b) the defendant shall pay the plaintiff the sum of RM9,835,349 being the put option price as stated in the put option notice dated 4 January 2011, C by way of a banker's draft made out to the plaintiff to be delivered to the plaintiff's solicitors, Messrs Zain & Co, at 6th Floor, Akademi Etiqa, 23, Jalan Melaka, 50100 Kuala Lumpur, within 30 days from the said notification; and

(c) costs of RM5,000 subject to allocator to be paid by the defendant to the D plaintiff.

[44] Before concluding the matter, I must say, I am most grateful to and thank both parties' counsel for having assisted this court through their research into the subject.

E

Application allowed.

Reported by Mohd Kamarul Anwar

F

G

H

I